NO. 83854-2

SUPREME COURT OF THE STATE OF WASHINGTON

CROWN CORK & SEAL,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

SUPPLEMENTAL BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

The Industrial Insurance Act generally requires each employer to pay for the results of injuries to its own employees, thereby encouraging safety and avoiding unfairly burdening other employers. The second injury fund provides a narrow exception to this rule. When a previously disabled worker suffers a subsequent injury on the job, and the combined effects of that injury and the previous disability result in permanent and total disability, the second injury fund pays for the portion of the disability pension costs not attributable to the subsequent injury. RCW 51.16.120.

Self-insured employer Crown Cork & Seal (Crown) claims that injured worker Sylvia Smith had "previous bodily disability" in her hands and wrists, and that therefore the second injury fund should pay a portion of Ms. Smith's pension costs not attributable to the 1997 forklift injury to her leg. The question here is whether a worker who was able to use her hands and wrists without limitation in a physically demanding job had a "previously bodily disability" in those body parts.

The Court of Appeals interpreted "previous bodily disability" to require proof that the condition "substantially and negatively impacts a worker's daily functioning and efficiency." Slip op. at 8. The Court agreed that "the term disability 'connotes a loss of earning power,'" but believed proof of this was not "absolutely required" provided there is

proof the disability substantially and negatively impacted a worker's daily functioning and efficiency. *Id.* at 8.

The Court of Appeals' test, which Crown agrees with, does not go far enough. The standard under RCW 51.16.120 should require a showing that the worker's previous bodily disability had some effect on the worker's earning power or ability to work. This "vocational" test requires a nexus between the disability and employment. A nexus that focuses on workplace disabilities reflects the statutory purpose of encouraging employers to hire and retain workers facing barriers to hiring and retention. While evidence of substantial and negative impairment in daily living may be used to infer disability in employment, the condition must be shown to affect the worker's earning power or ability to work.

In this case, any inference that might be drawn from Ms. Smith's testimony about her daily living activities is eliminated by the fact that she had no vocational impact from her medical condition, and to the contrary performed a physically demanding job. Ultimately in this case it makes no sense that a worker who was able to use a body part for many years without any limitation to perform a physically demanding job could be considered disabled in that very body part.

A vocational test furthers the purposes of the Industrial Insurance Act to encourage employers to hire and retain disabled workers, but not to

allow employers to evade paying costs for industrial injuries. The financial responsibility imposed on employers provides a critical incentive for the employers to create a safe workplace. Allowing undue access to the second injury fund undermines this worker safety policy.

The Court should adopt a vocational test under RCW 51.16.120 that requires proof that a medical condition impairs the ability to work. Alternatively, if the Court adopts the Court of Appeals' test that looks to proof the medical condition "substantially and negatively impacted a worker's daily functioning and efficiency" as including non-work activities, this Court should clarify that this test requires proof of a significant and enduring impairment of function. Furthermore, the Court should in any event affirm the decision that Crown has not shown that Ms. Smith was previously disabled.

II. ISSUE

Does a medical condition that caused some pain and difficulty with household chores, but did not prevent the worker from doing her strenuous job tasks four straight days a week, 12 hours a day, qualify as a "previous bodily disability" under RCW 51.16.120?

III. STATEMENT OF THE CASE

Ms. Smith was injured in 1997 when a forklift ran over her leg. It is undisputed that before her injury occurred, Ms. Smith had been an

exemplary worker who, although troubled by hand pain, was able to perform a physically intensive job for many years.

Ms. Smith worked as a bagger of soda can lids on an assembly line. She would push a string of soda can lids into a bag, physically take that bag off the mandrel, fold the top of the bag over tightly, and then stack it onto a pallet. BR Gorker 6-7; BR Smith 37-38.[1] She would repeat this pattern about every 20 seconds during her entire 12-hour shift, four days per week. BR Gorker 6-7; BR Smith 34, 37-38.

Ms. Smith and other baggers complained of wrist and hand pain working at the bagging machine. *See* BR Gorker 10-11. As a result, Crown redesigned the machine. BR Gorker 11; BR Smith 41. Beyond this, Ms. Smith never requested any modification to her job duties or to the equipment to accommodate her hand pain. BR Gorker 10-11, 14.

Ms. Smith visited doctors a few times for her hands in 1994. In 1994 she visited an emergency room for hand pain, with two follow up visits to the doctor, at the last of which her doctor noted that her condition had greatly improved. BR Atteridge 7-9, 30. She received wrist splits in the ER visit and wore them periodically at work. Besides the 1994 visits, Ms. Smith received no further treatment of her hand pain until after the 1997 industrial injury. BR Atteridge 31.

[1] The Certified Appeal Board Record is cited as "BR" followed by the witness's name.

Ms. Smith's hand pain did not cause her to miss work nor prevent her from performing her job duties. Her hand pain also appears to have had minimal effect on her personal life. While she had some pain cutting vegetables, mowing her lawn, and doing house work, and she avoided these activities on the first day of her three-day weekends, there is no evidence that she had any assistance for these activities. BR Smith 34; BR Berndt 72-73.

Her doctor testified that he could not say that at the time of her 1997 injury she was suffering symptomatic and disabling effects as the result of her carpel tunnel condition. BR Atteridge 15. It was only until after the industrial injury that her attempt to retrain using a keyboard caused her hand condition to evolve. BR Atteridge 16-17.

Based on the evidence, the Department issued an order denying second injury fund relief to Crown. Crown appealed to the Board of Industrial Insurance Appeals. BR 35-36. After hearings, the Industrial Appeals Judge issued a proposed order affirming the Department order, ruling that any pre-existing condition of Ms. Smith was not a "previous bodily disability" under RCW 51.16.120(1). BR 27-37. The 3-member Board denied Crown's petition for review. BR 2.

Crown appealed to superior court, which reversed the Board. CP 4, 38-42. The Department timely appealed to the Court of Appeals (CP

43-49), which reversed the superior court by unpublished opinion, concluding that Ms. Smith did not have a "previous bodily disability." Slip op. at 9. This Court granted Crown's petition for review.

IV. ARGUMENT

A. The Second Injury Fund Test Should Require That the Employer Prove the Medical Condition Substantially Impaired the Ability To Work or Caused Loss of Earning Power

1. Setting a Low Bar for Employers To Qualify for Second Injury Fund Relief Would Undermine Employer Accountability and Worker Safety

To obtain second injury fund relief, an employer must show that the worker: (1) had a "previous bodily disability from any previous injury or disease," (2) sustained an industrial injury, and (3) became totally and permanently disabled as a proximate result of the "combined effects" of the two. RCW 51.16.120(1). Here, the dispute is whether Ms. Smith had a preexisting bodily disability at the time of her 1997 industrial accident. Mere existence of a medical condition is not enough to trigger the second injury fund relief. *See Rothschild Int'l Stevedoring Co. v. Dep't of Labor & Indus.*, 3 Wn. App. 967, 969-70, 478 P.2d 759 (1971). Rather it must be a preexisting disabling condition. *Id.* at 969-70.

The question is what does "disability" mean. When considering what test to apply to determine when the second injury fund may be used, it is important to consider the underlying public policies involved.

The purpose of the second injury fund is to encourage the hiring and retention of handicapped workers. *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962). The seminal Washington second injury fund decision, *Jussila*, emphasized that the general legislative rule under the Industrial Insurance Act is that employers pay their own way, and that second injury fund relief is an exception to that rule:

> The basic premise of the Work[ers'] Compensation Act is that industry is to bear the burden of the costs arising out of industrial injuries sustained by its employees . . . . Each employer's premium *should reflect his own cost experience in order to reward, and thereby encourage, safety, as well as to avoid an unfair burden on other employers.*

Jussila, 59 Wn.2d at 779 (citations omitted) (emphasis added). The basic rule of employer responsibility for workplace injuries creates a powerful financial incentive to keep the workplace safe. The second injury fund statute, therefore, must be construed in a way that does not undermine the employer's responsibility for maintaining a safe workplace.

2. The Definition of "Previous Bodily Disability" Should Require Proof of Impact on Ability To Work

A vocational test to prove a worker has "previous bodily disability" is contemplated by RCW 51.16.120. This is because RCW 51.16.120 is in the context of employment-related activities.

The term "disability" is not defined by the Industrial Insurance

Act. The Court of Appeals and the Board of Industrial Insurance Appeals rely on the definition of disability found in an occupational disease case, *Henson v. Department of Labor and Industries*, 15 Wn.2d 384, 391, 130 P.2d 885 (1942), *quoted in* Slip op. at 8 *and cited in In re Leonard Norgren*, BIIA Dec., 04 18211, 2006 WL 481048 (2006). *Henson* relied on a workers' compensation treatise to construe the term:

> Disability means the impairment of the workman's mental or physical efficiency. It embraces any loss of physical or mental functions which detracts from the former efficiency of the individual in the ordinary pursuits of life. It connotes a loss of earning power.

15 Wn.2d at 391 (quoting 2 Schneider, Work[ers'] Compensation Law, 1332, § 400 (2d ed.)). The Court of Appeals held that "[a]lthough the term disability 'connotes a loss of earning power,' this is not absolutely required provided that the disability substantially and negatively impacts a worker's daily functioning and efficiency." Slip op. at 8 (citing *Norgren*, 2006 WL 481048; *In re Marshall Powell*, BIIA Dec., 97 6424, 1999 WL 756228 (1999)).[2]

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[2] A similar definition was adopted by the Court of Appeals in *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 889, 883, 205 P.3d 979 (2009), that "[a] 'previous bodily disability' must have a substantial and negative impact on the worker's physical or mental functioning . . . ." In that case, a lineman was able to do a physically intensive job, but the Court held that the case needed to be remanded for fact finding to determine if he had previous bodily disability because he had a history of intermittent back symptoms. *Lee*, 149 Wn. App. 866. The Court of Appeals in both *Lee* and this case rejected the Department's argument that the full ability to do a demanding physical job precludes second injury fund relief. The Department contends that the Court of Appeals was incorrect in the *Lee* case as well as here.

The problem with the Court of Appeals' approach is it can result in a situation where a worker is able to perform a demanding physical job perfectly well using the body part that later is claimed to be disabled, but the worker is nonetheless considered disabled.

Not requiring an impact on ability to work or a loss of earning power misses the mark because it fails to recognize that activity outside work is irrelevant to the statutory purpose of encouraging hiring in the workplace. Holding that a prior medical condition must have significantly affected the earning capacity of the worker or ability to work in order to qualify as a "previous bodily disability" makes sense in light of the purpose of the statute, which is to provide an incentive to employers to hire and retain those workers whose medical conditions impose a barrier to being hired and retained. There is no need for an incentive to hire or retain those workers who are not affected in their ability to work.

At least where the worker's job is physically demanding, as here, a preexisting medical condition should be considered "disabling" within the meaning of the second injury fund statute only if the preexisting medical condition interfered with a worker's ability to perform the essentials of his or her job. *See Rothschild*, 3 Wn. App. at 969-70. This approach is consistent with *Henson's* explanation of disability that it "connotes a loss of earning power." 15 Wn.2d at 391.

The Court of Appeals in *Rothschild* used the fact that a worker was able to perform his physically demanding job to reject an argument that the worker was previously disabled. *Rothschild*, 3 Wn. App. at 969-70. *Rothschild* noted that the undisputed testimony was that the claimant, despite his prior injuries, did "'everything' required of a longshoreman." *Id.* The Court concluded that the employer was not entitled to relief from the second injury fund. *Id.* at 969-70.[3]

If non-employment functioning is considered relevant, the inquiry of whether a medical condition "substantially and negatively impacts a worker's daily functioning and efficiency" should be limited to determining whether limitations on daily living would by inference show limitations on the ability to do one's job.

It may not always be easy to prove prior effect of a condition on earning power, and proof of a significant effect on life activities could be considered a form of proof of a hidden effect on earning capacity.

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[3] This approach is consistent with older Board decisions that reflected a focus on effect on the worker's employment as the determinative factor in determining whether disability existed. In *In re Curtis Anderson*, Dckt. No. 88 4251, 1990 WL 310624, *2 (BIIA June 15, 1990), the Board related disability to a deleterious "effect upon an individual's performance of his employment." The Board found no disability despite prior injuries and medical conditions, where the worker was able to repeatedly return to work as a logger. *See also In re Alfred Funk*, BIIA Dec., 89 4156, 1991 WL 87432, *2 (1991) (decision of no pre-existing disability based in part on fact that worker, as in *Anderson*, was able to continue in life-long logging occupation without any apparent limitations).

B. If the Court Endorses the Court of Appeals' Test, It Should Clarify That a Showing of Previous Disability Requires Proof of a Significant and Enduring Impairment of Function

This Court, if it adopts the test used by the Court of Appeals, should clarify that the test requires a significant and enduring impact on function. This is important so that the test be consistent with other statutes under the Industrial Insurance Act such as RCW 51.32.080(5), which provides that, in making an award for injury-caused permanent partial disability (PPD), a "previous disability" is to be deducted from the post-injury level of PPD.[4] This Court in *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 206 P.3d 657 (2009), considered what "previous disability" to deduct from a worker's PPD rating in the case of a worker with degenerative arthritis. The Court held that "a preexisting condition that causes *intermittent* impairment of function is not a PPD for purposes of reduction of benefits." *Tomlinson*, 166 Wn.2d at 118 (emphasis added). *Tomlinson* relied in large part on the Board decisions construing RCW 51.16.120. *See Tomlinson*, 166 Wn.2d at 115, 117-18 (citing *Norgren*, 2006 WL 481048; *Pate*, 1992 WL 160673).

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[4] RCW 51.32.080(5) provides that "[s]hould a worker receive an injury to a member or part of his or her body *already*, from whatever cause, *permanently partially disabled*, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be *adjudged with regard to the previous disability* of the injured member or part and the degree or extent of the aggravation or increase of disability thereof." (Emphasis added.)

Tomlinson is also grounded in *Bennett v. Department of Labor & Industries*, 95 Wn.2d 531, 627 P.2d 104 (1981), which, like *Tomlinson*, construes the previous-PPD reduction provision of RCW 51.32.080. In *Bennett*, the injured worker had previously incurred a back injury in Oregon and had received an Oregon PPD award, but he had recovered sufficiently to be able to return full time to his heavy labor carpentry work. 95 Wn.2d at 534, 535 n. 1. After he incurred his subsequent injury in Washington, he reported to his attending physician that up to the time of the Washington back injury "he had experienced some weakness in his left leg." *Id.* at 534.

Bennett decided that this evidence was not sufficient to show prior disability:

> This weakness apparently was not disabling, since according to the testimony of the petitioner and that of his foreman, *he had been able to perform all the heavy duties of a carpenter on an industrial project without noticeable difficulty.*

Id. at 534 (emphasis added). The *Bennett* case reinforces that there is no disability if there is not an effect on the worker's ability to perform his or her work. Like the worker in *Bennett* who performed a heavy physical labor job without difficulties and was therefore not disabled, Ms. Smith performed her intensely repetitious physical labor with her wrists and hands without difficulty, and she similarly was not disabled.

Tomlinson and *Bennett* appropriately create a standard that requires that symptoms be more than merely intermittent to be considered disabling. Rather there must be significant and enduring loss of function. Creating a low bar for disability in the second injury context should not undermine the standard set by this Court for determining when there is preexisting PPD for the purposes of the PPD deduction statute. *Tomlinson*, 166 Wn.2d at 115, 117-18 (equating the previous disability standards of RCW 51.16.120 and RCW 51.32.080(5)).

C. Even Applying the Court of Appeals' Test, Crown Fails To Show a Substantial and Negative Impact on Ms. Smith's Ability To Do Her Job or Her Ability To Do Daily Living Activities Outside the Workplace

For the reasons explained above, the Court of Appeals' test for previous bodily disability is unsuitable, or at minimum requires this Court's clarification. However, even applying that test, Crown has not demonstrated eligibility for second injury fund relief by showing that Ms. Smith's medical condition substantially and negatively affected her daily functioning and efficiency. There are three areas of evidence to consider: (1) the evidence of Ms. Smith's workplace performance and whether there was accommodation to do this job, (2) the medical evidence regarding her condition, and (3) the evidence regarding her daily living activities.

First, Ms. Smith was able to perform her job notwithstanding her

hand condition. Ms. Smith was able to do repetitious hand movement for 12-hours straight for four consecutive days a week. She was not impaired from such movement during her employment.

She received no individual accommodation or adjustment of her job duties. There were changes to the machinery caused by the collective complaints of Ms. Smith and her co-workers. This does not show that Ms. Smith was unable to perform her job because of her hand condition. Her supervisor at work specifically testified that Ms. Smith was never rendered unable to perform her job as a result of her hand symptoms at any time before her industrial injury. BR Gorker 16.

Second, the medical evidence does not show any proof of previous disability within the meaning of RCW 51.16.120. The evidence shows only that she had a medical condition, which is insufficient to show disability. *E.g.*, *Rothschild*, 3 Wn. App. at 969-70; *Norgren*, 2006 WL 481048; *Anderson*, 1990 WL 310624. Medical testimony on a more probable than not basis that a condition is disabling is necessary in the workers' compensation context. *E.g.*, *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1, 3, 603 P.2d 1262 (1979) (medical testimony necessary to show aggravation of industrial injury); *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 709, 328 P.2d 663 (1958) (medical testimony is necessary

to establish disability).[5] Ms. Smith's doctor could not say whether or not Ms. Smith was disabled due to her carpal tunnel at the time of her 1997 industrial injury. BR Atteridge 15. The lack of such testimony is fatal to the claim that Ms. Smith had a disabling condition. *Page*, 52 Wn.2d at 711.

Ms. Smith sought medical treatment for her hands on just a few occasions in 1994, three years before her 1997 accident. She did not again seek treatment for her hand condition until well after the industrial injury. This is insufficient to show that she had disability—it shows merely that she may have had a medical condition. Occasional treatment does not show disability. *Norgren*, 2006 WL 481048; *In re Forrest Pate*, Dckt. No. 90 4055, 1992 WL 160673 (BIIA 1992). In *Norgren*, the worker had a right knee condition that surgery had been recommended for, which he did not do. If his knee bothered him he would have a cortisone injection. 2006 WL 481048 at *3. The Board rejected the employer's claim that this meant he had a disability, "the use of cortisone injections on rare occasions was insufficient to show disability." 2006 WL 481048 at *7; *see also Pate*, 1992 WL 160673 (receiving periodic treatment for ailments, or having flare-ups of illness does not establish disability where worker

[5] *Page* also stands for the proposition that objective findings are required to establish physical disability. *Pate*, 52 Wn.2d at 709. There is no medical testimony that Ms. Smith had objective findings of disability prior to her 1997 injury.

was positive for influenza, pleurisy, high blood pressure, fever, asthma, cough, shortness of breath, and sleep apnea); *Anderson*, 1990 WL 310624 (missing some work and receiving treatment for psoriasis was not enough to establish disability).

After her ER visit in 1994, Ms. Smith received wrist splints that she wore at work on occasion. Similar to the cortisone treatments in *Norgren*, this is insufficient to show a disability, particularly given, like the worker in *Norgren*, that such usage did not limit her in performing her job. Moreover, Ms. Smith's doctor testified that these splints could be used to treat solely subjective complaints, even if there were no objective evidence of disability. BR Atteridge 32.

Ms. Smith's doctor could not say whether or not Ms. Smith was disabled due to her carpal tunnel at the time of her 1997 industrial injury. BR Atteridge 15. As noted, this does not satisfy the requirement that there be medical testimony on a more probable than not basis that a condition is disabling. *Cf. Lewis*, 93 Wn.2d at 3; *Page*, 52 Wn.2d at 709. There was scant and insufficient medical testimony ostensibly directed to the question of whether she was disabled. Asked to assume that Ms. Smith had pain and swelling when she used her hands for more than 10 to 15 minutes to do things such as housecleaning or writing, chopping vegetables and that her hands bothered her at work and were painful at the

end of her 48-hour, four day work week, Dr. Atteridge was asked whether he would have put restrictions on her activities. Dr. Atteridge testified that for a repetitive use condition he would put restrictions on activities causing complaints. BR Atteridge 21. Besides the fact that the factual foundation was not laid for all of this hypothetical question, this testimony establishes only that there may have been some pain in using her hands and wrists. This is not enough to establish that she was permanently disabled in view of the fact that she was able in fact to continue to use her hands and wrists to perform strenuous physical activities. It was only when Ms. Smith attempted retraining that her carpal tunnel condition "evolved" and exacerbated her wrist condition to a point of disability. BR Atteridge 16-17.

Finally, the record does not show a significant and negative impact on her daily living activities.

The record in this case shows only that Ms. Smith suffered some pain while performing a few personal tasks.[6] As Barbara Berndt, the

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[6] There is only limited testimony regarding any limitations caused by pain:

Q. What kind of activity at home, for example, if any, caused you to have wrist pain?

A. Like if I cut off vegetables or trying to mow, most anything. All kinds of house work affected me real bad. So usually on my four days – when I worked the four-day shift, the first day I didn't do nothing at home because the constant movement made it worse.

BR Smith 34. There was no testimony that any doctor or other medical professional advised her not to do these activities.

Department's vocational expert, noted regarding Ms. Smith's report of not doing tasks like gardening, "there was nothing that suggested that she had to hire somebody else to do it or her sons had to do it because she couldn't. It was just a discussion that it was painful, but no accommodations were discussed." BR Berndt 55.[7] While Ms. Smith may have had difficulty with cutting vegetables, mowing her lawn, and doing housework, Ms. Smith was not restricted at that time from doing these tasks and indeed did not obtain assistance to do them. BR Smith 34; BR Berndt 72-73. The Court of Appeals was correct to conclude that this did not meet the standard of substantially and negatively affecting her daily functioning and efficiency.

Crown has pointed to Ms. Smith's report that she did not do anything after her first day off from work after her four consecutive days of 12-hour shifts. Petition at 3. Notably, no medical testimony supports

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[7] Ms. Berndt found it significant that Ms. Smith required no treatment, other than the splints, before her 1997 injury. BR Berndt 30. She found no evidence of disability:

> Ms. Smith came from another country, learned English, obtained work, stayed in the work, demonstrated the ability to be very successful. Her earnings note that she was able to stay in that job and be assigned for different jobs. So when I'm looking for something preexisting, I want to see something that thwarts that person's ability to do jobs or have to accommodate or modify or they're truncated in some sort of aspect of their life because they can't do things. It appears that she was able to function at work and do her job. It appears that she was able to function at home, pay her bills, get back and forth to work, raise two sons. I couldn't find things that would show that there was an impact on her work or home or any kind of relationships due to physical, psychological, mental, emotional, cognitive, or any kind of limitations.

BR Berndt 36-37.

the proposition that she was completely unable to do home work tasks on these days, no witness corroborates her claim of complete inactivity on these days, and she did not report ever having help with any home tasks.

Moreover, this testimony only establishes what is reasonable to assume, that after working four straight 12-hour shifts a person would rest on the first day of a 3-day weekend from a physically intensive job. If this were the standard to establish permanent disability, then any worker with a physically demanding job who takes it easy on the first day off to recover from its effects would be considered permanently disabled. This would be an untenably low standard with which to judge whether an employer may avoid paying for pension costs by using the second injury fund.

A result that would allow a worker who performs a physically demanding job to be considered disabled in the body part used without any physical limitation or accommodation to perform that job completely distorts the purpose of the second injury fund to encourage employers to hire and retain workers facing employment barriers.

Applying the test that an employer must show a condition "substantially and negatively impacts a worker's daily functioning and efficiency" shows Ms. Smith was not disabled at work or in her daily life.

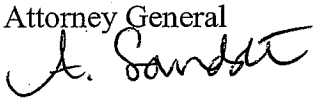
V. CONCLUSION

For the reasons stated above, this Court should decline to use the

Court of Appeals' test to determine disability, and should adopt a standard requiring proof that a condition affected ability to work or caused a loss of earning power. Alternatively, if this Court adopts the living activities test, the Court should clarify the test requires a showing of a significant and enduring impairment of function. Under any test, the Court should affirm the decision of the Court of Appeals that there is no evidence that Ms. Smith had "previous bodily disability" within the meaning of RCW 51.16.120.

RESPECTFULLY SUBMITTED this 1st day of June, 2010.

ROBERT M. MCKENNA
Attorney General



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SUPREME COURT OF THE STATE OF WASHINGTON

CROWN CORK & SEAL, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies she caused to be mailed by United States Mail, postage prepaid a copy of the **SUPPLEMENTAL BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES** and this **CERTIFICATE OF SERVICE** to:

Lee Schultz, Attorney
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Seattle, WA 98101-3304

And further certifies that she caused to be mailed the originals and a copy to:

Ronald R. Carpenter
Clerk of the Supreme Court
Washington State Supreme Court
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Signed this 1st day of June, 2010 in Seattle, Washington by:

Erlyn R. Gamad
Legal Assistant

ORIGINAL